No. 03-44

In the Supreme Court of the United States

BASIM OMAR SABRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to dismissal of the indictment charging him with three counts of bribery, in violation of 18 U.S.C. 666(a)(2), on the ground that the statute is facially unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 326 F.3d 937. The decision of the district court (Pet. App. A37-A62) is reported at 183 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2003. The petition for a writ of certiorari was filed on July 2, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted on three counts of bribery, in violation of 18 U.S.C. 666(a)(2). Before trial, the United States District Court for the District of Minnesota

dismissed the indictment on the ground that Section 666(a)(2) is unconstitutional on its face. Pet. App. A37-A62. The court of appeals reversed. Pet. App. A1-A29.

1. Petitioner, a Minneapolis, Minnesota, real estate developer and landlord, was charged with three counts of bribery, in violation of 18 U.S.C. 666(a)(2). In relevant part, Section 666 provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> * * * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. 666(a)(2) and (b).

The charges against petitioner arose out of bribes and bribe offers petitioner allegedly made to Brian Herron, who served on the Minneapolis City Council

representing the Eighth Ward from 1993 through July 2001. Pet. App. A64. According to the indictment, during the calendar year beginning January 1, 2001, the City of Minneapolis (the City) received approximately $28.8 million in federal funds. The Minneapolis Community Development Agency (MCDA) is a City agency created to fund housing and economic development programs within the City. In the calendar year beginning January 1, 2001, MCDA received approximately $23 million in federal funds. As a member of the City Council, Herron was a member of the Board of Commissioners overseeing the actions and budget of the MCDA. The Minneapolis Neighborhood Revitalization Program (MNRP) is an agency created by the City and other local government entities which provides funding for the economic revitalization of City neighborhoods. MCDA wholly funds MNRP. *Id.* at A63-A64.

Petitioner sought to develop a commercial real estate project within the Eighth Ward, the ward represented by Herron. Pet. App. A64-A66. The proposal "contemplated zoning, eminent domain/condemnation, licensing and funding actions by the City of Minneapolis, the MCDA, and the MNRP." *Id.* at A64. The indictment alleged that petitioner gave Herron $5000 in an attempt to obtain Herron's assistance in securing regulatory approval from the City to commence the real estate project (Count 1); that petitioner offered Herron $10,000 to threaten the current property owners that the City would use its power of eminent domain to take their property if they did not sell to petitioner (Count 2); and that petitioner offered to give Herron $80,000 as a 10% kickback in return for his assistance in obtaining $800,000 in community economic development grants from the City, MCDA, and other entities, for the real estate project (Count 3). *Id.* at A64-A66.

Before trial, petitioner moved to dismiss the indictment on the ground that Section 666 is unconstitutional on its face. Pet. App. A37. Granting the motion, the district court ruled that Section 666(a)(2) "does not require the government to prove a connection between the offense conduct and the expenditure of federal funds," Pet. App. A53, and that Section 666(a)(2) therefore exceeds Congress's powers under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1.[1] Pet. App. A53-A61. The district court found that the government's assertion that it would establish a connection between the bribes allegedly offered and paid by petitioner and the expenditure of federal funds was irrelevant to the motion to dismiss. *Id.* at A53 n.9.

2. The court of appeals reversed and remanded. The court of appeals agreed with the district court that Section 666 contains no requirement that the government prove a connection between the offense conduct and federal funds (other than the express requirement that the relevant organization, government, or agency have received benefits under a federal program in excess of $10,000 during the one-year period). Pet. App. A4; see *id.* at A4-A14. The court of appeals also stated that, because Section 666 is a general criminal statute that directly regulates the conduct of persons who are not parties to any contract with the federal government, the statute was not within the congressional power to condition funding under the Spending Clause. *Id.* at A14-A19.

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[1] That provision declares that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the * * * general Welfare of the United States." See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 9 n.5 (1981).

The court of appeals, however, upheld the facial constitutionality of the statute based on Congress's authority to enact "necessary and proper" legislation, see U.S. Const. Art. I, § 8, Cl. 18 (Necessary and Proper Clause), to implement the Spending Clause. "[W]e conclude that §666 is a law necessary and proper to the execution of Congress's spending power." Pet. App. A21. The court explained that Congress has a right to disburse federal funds to "subnational agencies," and to protect those disbursements, once made, from misappropriation. *Ibid.* In that regard, Congress had made a determination that "the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds." *Id.* at A25. "The maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency," the court continued. *Ibid.* Because "money is fungible" and "federal funds are often commingled with funds from other sources," the court also rejected the suggestion that corruption involving a discrete agency department or section that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program. *Ibid.*

The court of appeals also noted that, in *Salinas* v. *United States*, 522 U.S. 52, 60 (1997), and *Fischer* v. *United States*, 529 U.S. 667 (2000), this Court had rejected as-applied challenges to Section 666. Pet. App. A19. In view of those decisions, the court of appeals explained that it would be "ill-advised to now declare that §666 is void ab initio as being outside of Congress's legislative domain." *Ibid.*

Judge Bye dissented. Pet. App. A29-A36. In Judge Bye's view, Section 666 could not be upheld under the Necessary and Proper Clause because the statute

"usurp[ed] the traditional domain of state authority" and therefore was not a "proper" law. *Id.* at A33. "The lack of any connection" between federal benefits and the bribe, he stated, "makes all too real the risk that federal anticorruption efforts will swamp state and local efforts to combat bribery." *Id.* at A33-A34.

ARGUMENT

Petitioner urges this Court to grant the petition for a writ of certiorari to resolve whether Section 666 should be construed to require the government to prove some connection between the offense conduct and federal funds other than the express statutory requirement that the relevant organization, government, or agency have received benefits under a federal program in excess of $10,000 in any one-year period. The court of appeals correctly held that Section 666 does not require a specific nexus (beyond the statutory requirement that the covered entity have received more than $10,000 in federal benefits in a single year) between federal funds and the charged criminal conduct and that, so construed, the statute is facially constitutional. While there is some disagreement among the courts of appeals on the federal nexus necessary to permit conviction under Section 666, this case is not an appropriate vehicle for addressing that issue. The issue's resolution would not alter the judgment in this case, which rejects petitioner's facial challenge to the statute. The case lacks the sort of factual development that would permit the Court to address the issue in a sufficiently concrete manner. And the case's interlocutory posture also makes review inappropriate at this time.

1. This case involves a facial challenge to Section 666's constitutionality. See Pet. App. A37 (motion to dismiss indictment "on the grounds that 18 U.S.C. §666

is unconstitutional on its face"); *id.* at A29 (reversing "that part of the district court's judgment finding §666 [ ] facially unconstitutional"). "A facial challenge to a legislative Act is * * * the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). "The fact that the * * * Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Ibid.*

Whether or not Section 666 is interpreted to require proof of an additional nexus between a bribe and the expenditure of federal funds, petitioner cannot make the required showing that Section 666 is incapable of constitutional application. In *Salinas* v. *United States*, 522 U.S. 52 (1997), this Court upheld a conviction under Section 666(a)(1)(B), a parallel provision to the subsection at issue here, when the defendant was a county sheriff's deputy who received a bribe from a federal prisoner who was housed in the county jail pursuant to a federally funded program. The Court determined that, because the bribe at issue there posed "a threat to the integrity and proper operation of the federal program," *id.* at 61, the nexus between the defendant's conduct and the expenditure of federal funds was "close enough to satisfy whatever connection the statute might require," *id.* at 59. The Court specifically rejected the argument that Section 666 exceeds Congress's legislative powers. The Court stated that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case," *id.* at 60, and held that "the application of § 666(a)(1)(B) to

Salinas did not extend federal power beyond its proper bounds," *id.* at 61.

The claim that Section 666 is unconstitutional on its face cannot be reconciled with *Salinas*. Because *Salinas* found a set of circumstances under which Section 666 would be valid, *i.e.*, the circumstances of *Salinas* itself, it forecloses the claim that "no set of circumstances exists under which the Act would be valid," *Salerno*, 481 U.S. at 745. As the court of appeals recognized, it would be "ill-advised"—indeed, incongruous—for a court of appeals "to now declare" Section 666 incapable of constitutional application and thus unconstitutional on its face "after [this] Court has * * * indicated that the statute can be constitutional as applied." Pet. App. A19.

Consistent with the decision in this case, every court of appeals to have addressed Section 666's facial constitutionality has upheld the statute. For example, in *United States* v. *Edgar*, 304 F.3d 1320, cert. denied, 537 U.S. 1078 (2002), the Eleventh Circuit reasoned:

> [A] basis for the enactment of § 666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power. As a means of ensuring the efficacy of federal appropriations to comprehensive federal assistance programs, the anti-corruption enforcement mechanism strikes us as bearing a sufficient relationship to Congress's spending power to dispel any doubt as to its constitutionality.

Id. at 1325; accord *United States* v. *Bynum*, 327 F.3d 986, 991 (9th Cir. 2003) ("We agree with the Eighth and Eleventh Circuits that § 666 is facially constitutional.").

2. Respondent does not directly contest the court of appeals' rejection of his facial challenge. Instead, respondent focuses primarily on the court of appeals' conclusion that Section 666 does not require a nexus between the bribe and federal funds (other than the express requirement that the organization, government, or agency the defendant sought to influence have received benefits in excess of $10,000 under a federal program during the relevant one-year period).

In *Salinas*, this Court held, as a matter of statutory construction, that the government did not have to show that the bribe had "any particular influence on federal funds." *Salinas*, 522 U.S. at 61. But the Court left open "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." *Id.* at 59. Following *Salinas*, there has been some divergence in the courts of appeals on whether and to what degree Section 666 requires the government to prove such a further connection between the defendant's criminal acts and a federal programmatic interest (including, but not necessarily limited to, the integrity of federal funds).[2]

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[2] Since *Salinas*, the Sixth and Seventh Circuits, and the Eighth Circuit in this case, have all held that Section 666 contains no requirement that the government prove any connection between the offense conduct and federal funds beyond the express statutory requirement. Pet. App. A14-A19; *United States* v. *Suarez*, 263 F.3d 468, 489-491 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Dakota*, 197 F.3d 821, 826 (6th Cir. 1999); *United States* v. *Grossi*, 143 F.3d 348 (7th Cir.), cert. denied, 525 U.S. 879 (1998). The Second Circuit, in contrast, has reaffirmed, in dicta, its pre-*Salinas* position that Section 666 requires the government to show some connection between the prohibited act and a federally funded program. *United States* v. *Santopietro*, 166 F.3d 88, 92-94 (2d Cir. 1999). The Third Circuit has similarly held that Section 666 "requires that the government prove a federal interest is

This case, however, does not squarely require resolution of that issue, because the judgment rejecting petitioner's facial challenge is correct without regard to whether Section 666 imposes a further nexus requirement. As noted above, the facial challenge petitioner brought could succeed only if Section 666 were incapable of constitutional application. Pp. 6-8, *supra*. Because Section 666 is capable of constitutional application —and no court of appeals has held otherwise—the court of appeals correctly rejected petitioner's facial challenge and reversed the district court's contrary decision.

This case, moreover, lacks concrete development of facts that bear on the ultimate legal issues the petition seeks to raise. In both district court and the court of appeals, the government explained that it could establish a connection between the bribes allegedly offered by petitioner and the expenditure of federal funds. See Pet. App. A53 n.9; Gov't C.A. Br. 24-25. The evidence at trial, the government explained, would show that Councilperson Herron had direct control and influence over the federal funds received by the City of Minneapolis and the MCDA; that those same federal funds were directly related to economic development programs operated by the City and MCDA; that the economic and development programs operated by the City and the MCDA were directly involved in the real estate development that petitioner proposed; that petitioner's bribes and bribe offers sought to corrupt the operation of the city's economic redevelopment

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implicated by the defendant's offense conduct," although it minimized that requirement by indicating that a "highly attenuated" federal interest would suffice. *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999).

process; and that petitioner offered a direct kickback of the federal economic development funds obtained. See Gov't Br. 24-25. As it did in *Salinas*, the government thus was prepared to present evidence sufficient to show that the nexus between the defendant's conduct and the expenditure of federal funds was "close enough to satisfy whatever connection the statute might require." 522 U.S. at 59. Because the challenge was facial, however, the district court deemed the government's proffer irrelevant; and the court of appeals did not mention it. Pet. App. A53 n.9.

Review in this posture would be particularly awkward given that petitioner, in the district court and court of appeals, argued against the further nexus requirement. In the lower courts, petitioner did not contend that the government failed to provide sufficient proof of a statutorily required nexus; he argued that the statute was unconstitutional on its face because it does not require proof of a nexus. Petitioner thus asks this Court to review the statutory question of whether a further nexus is required even though the court of appeals agreed with petitioner's position. He now contends (Pet. 12) that, if Section 666 is construed to require a nexus between the illegal conduct and federal funds beyond the literal requirements of the statutory language, the first two counts of the indictment should be dismissed because such a nexus is not sufficiently alleged. Petitioner does not make that claim with respect to Count 3, which specifically alleges that the bribe was to constitute a percentage of the funds petitioner obtained in community economic development grants. See Pet. App. A66. Because petitioner's present argument on the nexus issue, even with respect to the first two counts, was not raised or addressed either in the district court or the court of appeals, it is not the

sort of claim this Court will ordinarily review. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (Court ordinarily will not consider issues not pressed or passed upon below); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977) (same); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (same).

Finally, this case is at an interlocutory stage and does not warrant review at this time. The court of appeals reversed the dismissal of the indictment and remanded for further proceedings. Only in "extraordinary cases" will this Court grant a petition for a writ of certiorari before "final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). If petitioner is acquitted at trial, or if any conviction is reversed on independent grounds, his constitutional challenge to Section 666(a)(2) will become moot. If petitioner is found guilty and his conviction is affirmed on appeal, he will be able to raise the instant claims—along with any other challenges petitioner might have to the judgment of conviction—at the conclusion of proceedings in the trial court and the court of appeals with the benefit of a full record. Review by this Court is therefore unwarranted at the current time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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